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COMMON-SENSE AND COPYRIGHTS.

BY THE HON. GEORGE S. BOUTWELL.

IF the voice of the recognized organs of public sentiment is accepted as a fair expression of the opinions of the American people, there is in this country a general judgment in favor of a system of international copyright. It is probable, however, that the American people have not so considered the subject as to be qualified to form an opinion, and they may never form an opinion until the system is tested by experience. The people, as a whole, may have a large interest in the question, but, with the exception of authors and publishers, the individual interests are too slight and too remote to create and crystallize a public sentiment. The authors and publishers, supported by a large body of influential citizens, are active in aid of the policy. As a result, or as a coincident circumstance, the literature of Great Britain and the United States is controlled by the friends of the proposed measure. This array has existed, in fact, if not in form, for many years, and yet the progress of the undertaking has been only moderate.

The opposition, for the most part, has been voluntary, individual, and unsystematic. The difficulties in the way of the movement and the delays that have occurred have not been due, in any appreciable degree, to the manifestations of doubt and hostility that have been so made, but rather to a notion, which is quite general in the public mind, that the adoption of the system will inaugurate an era of comparatively expensive literature for America. Their process of reasoning may be erroneous, but it is simple and direct. If English authors are to be benefited under the proposed system by the sale of their writings in the United States, then the purchasers and readers of English books must pay something additional for the privilege of owning and reading reprints of English works.

And if there is error in this view of the subject, it is difficult

to say wherein it consists. If the English author is to receive a royalty under the proposed system, while now he receives nothing, then, beyond dispute, somebody must pay. The necessity falls upon the publisher. He must pay or he cannot print. Will he bear the burden or will he transfer it to the purchaser? If to the purchaser, then every public library, every private collection, every casual reader of a foreign book, will be compelled to share in the contribution.

If, then, this reasoning be free from error, it follows that the proposed copyright system contemplates a scheme of taxation of the American people, indirect to be sure, and not universal or equal, but yet a legalized system whose benefits inure primarily and chiefly, if not exclusively, to persons who are not citizens of the United States. Such a scheme can be defended only upon the ground of justice or national expediency.

On the ground of justice it is claimed that an author has a property in the thought which he has chosen, combined with the form in which he has seen fit to express the thought, and that it is a crime for another person to reproduce that thought in that particular form. If this be not so, then the adoption of the scheme cannot be demanded upon the ground of its justice. This claim of property in the thought, combined with the form of expression, is to be distinguished from the material,—that is, from the book or pamphlet in which the thought is expressed. The book is property and the law protects it, but the real question remains; which is this: When the author has sold the book and received payment therefor, is it a crime in the purchaser to reproduce that book?

For the purposes of government, crimes are of two sorts, and it seems not to be within the province of ethical inquiry to change or to modify the arrangement. First, certain acts are criminal in their very nature. Such are murder, burglary, highway robbery, and a long catalogue of acts whose criminal character is recognized by all civilized and by many savage peoples. Can it be maintained that the reprinting of a book which one has purchased and paid for, is a crime *per se*? that it is to be classed with burglary and highway robbery?

The manifest answer to these questions is that it has never been so classed, and that the sentiments and the judgment of mankind would revolt at such a classification.

Secondly, certain acts are made crimes by law. Such, for example, is smuggling. In the nature of things, it is not a crime to carry goods from one country to another country. The act has no moral quality in it. Considered in itself, it is neither good nor bad. When, however, the law prohibits or regulates the importation of goods, then a violation of the law becomes a crime, and the offender will be treated as a criminal.

If the reprinting of a foreign book is not a crime in the nature of things, or, as the law terms it, is not a crime *per se*, and if such reprinting be not a crime by statute, then there is no foundation for the claim that it is a crime to reproduce a foreign book in the United States; consequently the injustice of reprinting a foreign book is not in the criminal nature of the act.

But it may be claimed that there is a right of property in a thought when expressed in a certain form, although the reproduction of that thought in the same form is not a crime. In reply, it is to be said that the right of property, if such right exists, is not in the circumstance that the expression of the thought is presented in a printed book. The right, if it exist at all, must inhere in the spoken word as surely as in the written or printed paragraph.

The fact that an author has employed a stenographer to write, or a compositor and printer to print, the expression of his thought, gives to him a property in the manuscript or book, but he thereby acquires no right of property in the thought so expressed that he would not have had in the thought expressed in the same form at a dinner-table conversation. In the nature of things, and without the intervention and aid of the law, a thought expressed, and however expressed, whether in conversation, or by open writing, or by public printing, is thereby dedicated to the public. A thought unexpressed is a possession, but it is not property, and when it has been uttered it is neither a possession nor property.

The Constitution of the United States, in the provision relating to authors and inventors, proceeds upon the idea that authors and inventors have no right of property in their writings or inventions, independent of the particular book or device in which the thought is expressed. The phrase is this: "The Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." If

there were a right of property in expressed thought, then there was a corresponding duty resting upon the Government to protect that right, not for a limited period of time, but perpetually. In pursuance of that provision of the Constitution, inventors are secured in their inventions for the term of seventeen years, and authors for the term of twenty-eight years, with the privilege of an extension for fourteen years. If authors and inventors have a right of property, as claimed, then, by the Constitution and laws, their property has been appropriated to the public for all time in excess of the specified times, and that without compensation. If the opinion of the framers of the Constitution is of any value, the reason assigned for the provision is a refutation of the claim of right of property in thought expressed. The authority was granted to Congress as a means of promoting "the progress of science and useful arts." The monopoly given to writers and inventors is thus justified on grounds of public policy, and without the least reference to property rights.

Upon this view of the subject it is claimed that authors have no right of property in a thought, however expressed, independent of the material form in which the expression is uttered, and, consequently, that the reproduction of the language in which the thought is expressed is free of criminal taint. And it follows, further, that whatever rights of property authors and inventors have enjoyed, were rights created by the law upon grounds of National policy and subject at all times to the will of the Government, and this without any violation of private rights or neglect of public duty.

If it may now be assumed that the international-copyright system cannot be vindicated upon the ground of justice to authors and writers, the single question remains : Is it expedient for the Government and people of the United States to adopt the system ?

Practically, the question is important chiefly in connection with Great Britain and its dependencies. The publication of a foreign book in another language is an unusual occurrence in the United States, and a translation made by a citizen is entitled to the benefits of the copyright system. As between Great Britain and the United States there is great inequality. The population of the United States is in the ratio of twelve to seven, when compared with the population of Great Britain, and in proportion to

population we would furnish two readers of an English book as often as Great Britain would furnish one reader of an American book. The ratio of readers would be as twenty-four to seven. The fact may not be creditable to us as a literary people, but it is probable that the number of English books copyrighted in America would be three times as great as the number of American books that would be copyrighted in England.

Thus it must happen that England would contribute only a moderate amount to the support of American authors, while the United States would contribute at least three times as much to English authors. If, therefore, we were prepared to coöperate with Great Britain in a system of protection to the authors of the two countries, we ought to consider whether the advantages are to be equal. Can we afford to pay three dollars to English authors and writers in order that American authors may receive one dollar from the reading public of Great Britain?

All this assumes that the price of English books will be increased in the United States, and that the price of American books will be advanced in Great Britain; and if this assumption be not just, we may well inquire by what means are the authors of either country to be benefited by an international-copyright system. If we apply the logic of trade to the case, we are justified in the conclusion that the prices of English reprints would correspond to the prices of American books, while at the present time they are sold at much lower rates. The competition thus existing affects the price of American books, and always in favor of the public.

It is claimed that an international-copyright system will encourage writing in America, and especially that young and unknown authors will be benefited.

Should this prediction prove true as to America, must not English writers enjoy a greater advantage, inasmuch as the American market is a more profitable field for them than is the English market for us? But it is an error to assume that unknown authors suffer most largely from the reprint of English books in the United States. The reprints are of standard works, usually, and the competition is chiefly with our best writers. In truth, however, the competition is less in books than in any other department of trade, inasmuch as the writings of one author can never be accepted as the equivalent of the writings of another.

The presence of many books on the market tends to an increase of sales, and the sale of good books at low prices adds yearly to the number of persons who will buy other good books at higher prices.

If we divide American authors into two classes, it will appear that one class does not need the benefits of an international-copy-right system, and that the other class could not participate in those benefits. First, those American authors whose writings would be reprinted and read in Great Britain are, generally, amply compensated by the monopoly of the American market. Secondly, it may be said of the majority of American writers, that their works could not be sold in Great Britain, and, therefore, to all such, the monopoly of that market could have no value. To the latter class some benefits might arise from the exclusion of English works which are now sold at low prices and interfere to some extent in the sale of American low-priced literature. But at the end, if the element of justice be eliminated from the claim of American authors, none but the most important reasons can warrant the government of the United States in the adoption of a system which will limit the opportunity of the great body of the American people to read and to enjoy the choice literature of England.

In this I assume that an English author has no claim upon us on the ground of justice, and that he is not a proper subject for the exercise of the spirit of benevolence. All this rests upon a principle of action that is daily recognized by nations and by individuals. If one nation makes an improvement in naval architecture or gunnery, is it thought improper for another nation to follow the example?

But it is said that manufacturers are protected, that sea-coast commerce is protected, and, above all, that inventors are protected by an international system, and that equal reasons exist for the protection of authors. An examination of this claim may show that it does not rest upon any principle or rule of protection that has been recognized in the policy of the United States. The coast commerce is protected by the exclusion of foreigners, but it is open to the free competition of American citizens. The features of a monopoly cannot be found in the system, and its benefits inure exclusively to our own people. The laws in regard to the coasting trade exclude foreigners from its benefits, while the pro-

posed international-copyright system gives to a foreigner a monopoly of the American market. We deny to foreign-built ships the privilege of an American register, but the business of building ships in the United States is open to every citizen. These laws rest upon the theory that we exclude the outer world for the purpose of protecting and encouraging the genius and industry of our own people. The international-copyright system may give encouragement to the genius and industry of American citizens, but it will give also equal encouragement to the genius and industry of the subjects of England.

The basis of the system of protection to domestic industry appears to be this: that as a matter of public policy it is wise to impose a duty upon an article of foreign production which shall diminish or prohibit the importation of that article, and with the expectation that, after a time for experience, the article can be produced in the United States at the cost, substantially, of the foreign product. It is the purpose of the system to exclude the foreign product from our markets, or to limit the importation, while the effect of the international-copyright system is to give to the foreign author a monopoly of the American market in the particular article that he produces. The American manufacturer, although protected against foreign competition, is, nevertheless, exposed to constant and active domestic competition.

The chief argument from analogy is drawn from the policy of the Government in regard to inventions, which, as is claimed, are entitled to no more consideration than writings. At first view, this claim seems to be well founded, but an examination of the subject cannot fail to destroy the argument from analogy.

It was the early policy of the Government to grant patents to foreign inventors; and within the last three years the United States has become a party to the Industrial Convention, which is an open alliance, and now comprises about fifteen of the most important states of both continents. By the terms of the convention, a patent granted in one state is protected in all. This arrangement rests upon a reason, or rather upon a business fact, which places the wisdom of the policy outside of the region of debate. A patent granted in the United States would be of but little value to the patentee, if persons in Great Britain, France, and Belgium could make the patented article without the payment of a royalty, and then export the device or manufacture to the United States,

and offer it for sale in competition with the same article on which a royalty had been paid to the inventor by the American manufacturer. And if the Government should impose a prohibitory duty upon the patented article, the rest of the world would still be open to foreigners, while the American manufacturers would be excluded from its markets.

It is thus apparent that there can be no monopoly of a patented article in one country unless there is, at the same time, a like monopoly in all countries having commercial intercourse with each other. We may imagine a like condition of affairs in regard to American books, but, as a fact, a like condition never did exist, and there is not the slightest probability that it can ever exist. And, thus, I claim that the advocates of an international-copyright system are not supported in their arguments by the policy of protection as it has been developed in this country, whether with reference to coast-wise trade, or to ship-building, or to protective duties levied on foreign products, or to the international system of protection to patented inventions.

Next to a system of public instruction, this country is most largely interested in the publication of valuable reading matter, and at a moderate cost. If the foreign author cannot claim protection in this country upon the ground of justice, and if it is inexpedient for us to concede protection as a public policy, there is no sufficient reason remaining for the adoption of the international-copyright system. The reading public in America is a large one, and it is increasing in a ratio far greater than the increase of population. That public can never be less in numbers, or less capable of purchasing books, than it is now is. Authors are protected and supported by a body of readers not less than twenty millions strong. Their condition is as satisfactory and their prospects are as promising as are the condition and prospects of any other class of American citizens.

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